

## REDACTED-FOR PUBLIC INSPECTION

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### VIA HAND DELIVERY

September 13, 2007

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Suite TW-A325  
Washington, DC 20554

**Re: Petition of Qwest Corporation for Forbearance Pursuant to 47  
U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area,  
WC Docket No. 04-223**

Dear Ms Dortch:

Enclosed for filing in the above-referenced proceeding are an original and four (4) copies of the REDACTED version of the "Reply to Opposition" of McLeodUSA Telecommunications Services, Inc. This filing is also being submitted in the Commission's Electronic Comment Filing System.

Under separate cover and in accordance with the *Protective Order*<sup>1</sup> and the July 30, 2007 *Public Notice* in this proceeding,<sup>2</sup> Confidential copies of this "Reply to Opposition" are being submitted to you along with Janice Myles of the Wireline Competition Bureau.

Enclosed is an extra copy of this REDACTED filing, please date stamp and return it to the courier.

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<sup>1</sup> See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-233, Protective Order, DA 04-1870 (rel. June 25, 2004).

<sup>2</sup> See *Pleading Cycle Established for Comments on McLeodUSA Telecommunications Services, Inc.'s Petition for Modification of the Qwest Omaha Order*, WC Docket No. 04-223, Public Notice, DA 07-3467 (rel. July 30, 2007).

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Marlene H. Dortch  
September 13, 2007  
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**REDACTED-FOR PUBLIC INSPECTION**

Should you have any questions about this filing, please contact me.  
Sincerely yours,

Robin F. Cohn

A handwritten signature in black ink, appearing to read "Robin Cohn", with a small flourish at the end.

Enclosure

cc: Janice Myles (2 copies via hand delivery)  
Best Copy and Printing (1 copy via email)

**REDACTED - FOR PUBLIC INSPECTION**

**WC DOCKET NO 04-223**

**September 13, 2007**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

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Petition of Qwest Corporation for Forbearance

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WC Doc. No. 04-223

Pursuant to 47 U.S.C. § 160(c) in the

)

Omaha Metropolitan Statistical Area

)

**REPLY TO OPPOSITION**

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Dated: September 13, 2007

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**Summary**

Qwest suggests that it does not need to offer McLeodUSA reasonable terms and conditions of wholesale access because McLeodUSA may obtain wholesale access from other providers in Omaha. McLeodUSA has obtained access to a study by GeoResults which shows that other providers including cable have connections to only a tiny percentage of commercial buildings in Omaha, a far cry from the *Omaha Forbearance Order's* assumption of 75% "coverage" by cable. Contrary to Qwest's suggestion, McLeodUSA does not buy wholesale access from Cox because of price but because Cox lacks access to the great majority of McLeodUSA's customer locations in Omaha.

The Commission's predictive judgment was clearly erroneous. Qwest fails to provide concrete evidence of the actual level of facilities-based competition which could even in theory lend some credence to the Commission's predictive judgment. Qwest does not attempt to distinguish line losses attributable to carriers using Qwest facilities, including UNEs. Reference to trade articles about cable aspirations to serve business customers says nothing about the extent of facilities-based competition in Omaha. If the market were competitive in Omaha, Qwest would not be proposing to raise prices. The GeoResults study makes clear why the marketplace incentives that the Commission relied on do not exist. There is no facilities competition except to the tiny percentage of commercial buildings to which competitors have established their own facilities.

Contrary to Qwest's suggestion, far from being irrelevant, TELRIC provides a useful yardstick to measure whether Qwest's prices are reasonable. TELRIC is a flavor of forward

looking prices which the Commission has determined should govern competitive prices in a number of areas besides UNEs, including interconnection and special access.

Qwest has not made reasonable wholesale offerings. Its claim that 47 of 58 CLECs that have ICAs with Qwest have signed amendments implementing the *Omaha Forbearance Order* says nothing because those amendments do not constitute wholesale offerings and it is not clear that any of those CLECs use UNEs or even operate in Omaha.

Qwest has not shown that its proposed DS0 commercial offering is reasonable. The fact that one CLEC - AT&T/TCG - has entered into a commercial agreement for DS0 loops does not show that its commercial agreement is reasonable. In the *TRO*, the Commission wisely envisioned that it would take more than one commercial agreement to constitute evidence of reasonable pricing. The Nebraska PSC DS0 UNE prices are not relevant because they are not TELRIC compliant and because Qwest itself disregarded them and set prices in Nebraska based on Colorado UNE prices. Qwest's proposed DS0 commercial agreement is unreasonable among other reasons because it would set prices 30% above forward looking prices, does not include performance metrics, and insists on limiting the CLEC to using loops to serve its own retail customers.

Qwest's proposed wholesale offer of DS1 and DS3 facilities is unreasonable because it is no more than Qwest's general special access offering. That offer is unreasonably discriminatory under Sections 201(b), 202(a), and 271 of the Act as a replacement for UNEs in nine wire centers in Omaha because it is loaded with terms and conditions designed for region wide purchasers that McLeodUSA could never meet. Even if not unreasonable as an offer for UNE replacement in Omaha, Qwest's general special access offering is unreasonable for all the reasons brought to the Commission's attention in the *Special Access NPRM* proceeding including that

Qwest is earning excessive rates-of-return and that discounts are tied to anticompetitive terms and conditions.

McLeodUSA has made reasonable offers for purchase of wholesale access from Qwest. Its proposal for pricing set at 15% above UNE prices is reasonable because this price is close to forward looking cost price levels. McLeodUSA proposed prices actually exceed the prices that Qwest charges to its own retail customers for comparable or higher speed Internet access services.

Contrary to Qwest's claim, McLeodUSA will not exit the Omaha market absent reasonable commercial agreements because of competition there or because a UNE-based business plan is fundamentally flawed. Prior to its pullback after the *Omaha Forbearance Order*, McLeodUSA was developing an expanding and dynamic customer base. Recent analyst reports show that "smart build" CLECs face a bright future. In any event, Qwest is in no position to lecture others in light of its recent return from the brink of bankruptcy and poor marketplace performance.

Because competition will diminish in Omaha absent reasonable terms and conditions of wholesale access, the Commission should promptly grant McLeodUSA's Petition for Modification and reinstate section 251(c)(3) obligations.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	WC Doc. No. 04-223
Pursuant to 47 U.S.C. § 160(c) in the	)	
Omaha Metropolitan Statistical Area	)	

**REPLY TO OPPOSITION**

McLeodUSA Telecommunications Services, Inc. (“McLeodUSA”) submits this Reply to the Opposition of Qwest Corporation (“Qwest Opposition”) to McLeodUSA’s Petition for Modification (“McLeodUSA Petition”) in the above-captioned proceeding.

**I. QWEST IS THE ONLY POTENTIAL PROVIDER OF WHOLESALE ACCESS TO THE VAST MAJORITY OF CUSTOMER LOCATIONS IN OMAHA**

Qwest attempts to change the subject from its own failure to make reasonable wholesale offerings of network elements in the nine affected wire centers in Omaha by suggesting that McLeodUSA may obtain wholesale access in Omaha from other providers.<sup>1</sup> It references Cox’s website, which states that Cox offers “Carrier Access Service” in Omaha.<sup>2</sup> Qwest alleges that Verizon, Windstream, and AT&T also offer wholesale interstate special access service in Omaha.<sup>3</sup>

The availability of wholesale access from other providers *somewhere in Omaha*, however, says nothing about the extent of coverage of those providers’ networks. Cox and other non-incumbent providers face all the same difficulties and economic infeasibility of constructing

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<sup>1</sup> Qwest Opposition at 3-6.

<sup>2</sup> *Id.* at 4-5.

<sup>3</sup> *Id.* at 5.



loops and transport at the DS1 and DS3 levels, as cited by the Commission in the *TRRO*.<sup>4</sup> Because of these practical impediments, ILECs continue to control access to the overwhelming majority of building locations. Cox's Carrier Access Service cannot substitute for Qwest's control of access to these customer locations, and therefore cannot obviate the need for reasonable wholesale offerings from Qwest.

McLeodUSA has obtained access to a study by GeoResults that shows Qwest controls access to the vast majority of commercial buildings in Omaha. This study shows that as of August 2007 there were 27,868 commercial buildings in Omaha, of which only **[Begin Confidential] - [End Confidential]** had a lit CLEC presence, including Verizon, AT&T, and Windstream. Cable had connections to only **[Begin Confidential] - [End Confidential]** of commercial buildings.

In the *Omaha Forbearance Order*, the Commission relied on the fact that Cox had fiber running to at least 75 percent of premises within a Omaha wire center to justify the grant of forbearance. The GeoResults data conclusively demonstrates that having fiber merely passing by a premise cannot be transformed into evidence of actual facilities-based choice in these wire centers. The same economic barriers that make it economically infeasible for CLECs with metro fiber rings to construct last mile loops is also an economic barrier for cable companies. Even assuming the most favorable scenario that each of these connections are to distinct business premises, this data shows that the Commission's grant of forbearance in the nine (9) Omaha wire centers eliminates competitive facilities-based choice to any business customer located to about **[Begin Confidential] - [End Confidential]** of the commercial buildings in Omaha. The recent

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<sup>4</sup> *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶¶ 187-194 (2005) ("*TRRO*") *aff'd*, *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

findings of the GAO Report and the Department of Justice are thoroughly consistent with the GeoResults data.<sup>5</sup>

Contrary to Qwest's suggestion,<sup>6</sup> the reason McLeodUSA does not obtain wholesale access from Cox is not price, but that Cox does not have facilities reaching the great majority of McLeodUSA's customer locations. Cox is only able to provide access to a limited number of DS1 level McLeodUSA customer locations. More importantly, Cox does not offer a DS0 (POTs) solution to premises unless it is part of a channelized T1. In other words, Cox does not offer a solution whatsoever to replace the loss of DS0 UNE loops, which is what is used to serve more than 99% of the McLeodUSA customers in the affected wire centers.<sup>7</sup>

For these reasons, Qwest has not shown that McLeodUSA may rely on other wholesale providers in Omaha. As found by the Commission in the *Omaha Forbearance Order*, "the record does not reflect any significant alternative sources of wholesale inputs for carriers in this geographic market."<sup>8</sup> Qwest must be held to its obligation to provide wholesale access to loop and transport network elements on reasonable terms and conditions.

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<sup>5</sup> See U.S. General Accountability Office, Report to the to the Chairman., Committee on Government Reform, House of Representatives - Telecommunications, "FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services (November 2006); *United States v. SBC Communications, Inc. and AT&T Corp.*, 1:05CV02102 (EGS), Department of Justice Competitive Impact Statement at 6-7 (D.D.C. filed Nov. 16, 2005); *United States v. Verizon Comms., Inc. and MCI, Inc.*, No. 1:05CV02103 (HHK), Department of Justice Competitive Impact Statement (D.D.C. filed Nov. 16, 2005).

<sup>6</sup> Qwest Opposition at 4-5.

<sup>7</sup> To the extent necessary, the Declaration of Pritesh D. Shah is hereby clarified to this extent. See McLeodUSA Petition, Shah Declaration, ¶ 4.

<sup>8</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶ 67 (2005) ("*Omaha Forbearance Order*") *aff'd*, *Qwest Corp. v. FCC & USA*, No. 05-1450 (D.C. Cir. Mar. 23, 2007).

**II. THERE WAS, AND IS, NO BASIS FOR A PREDICTIVE JUDGMENT THAT QWEST WILL MAKE REASONABLE WHOLESALE OFFERINGS**

Qwest covers a considerable amount of paper with a purported showing that it faces intense retail competition in Omaha in an attempt to gloss over the obvious error of the Commission's earlier predictive judgment that Qwest would be compelled by market forces to make reasonable wholesale service offerings. Qwest apparently is suggesting that the Commission reaffirm or make a second predictive judgment that, because of this *retail* competition, Qwest will make reasonable *wholesale* offerings. One cannot reasonably ignore the intervening two years where Qwest's actual monopolistic behavior speaks volumes and again rely on Qwest's absolutely hollow promise of unregulated reasonableness.

Qwest's attempt to counter the reality of what has transpired since the *Omaha Forbearance Order* consists of continued reference to retail competition that simply reiterates what it and Cox previously provided to the Commission supplemented by statements that Qwest continues to lose business lines in the nine affected wire centers.<sup>9</sup> Qwest also references a trade press article to the effect that cable operators view the enterprise market as a significant opportunity and that Cox's business services are growing at 20% per year.<sup>10</sup>

The Commission should not rely on a 60,000 foot view of the Omaha market as advocated by Qwest. Qwest fails to provide any concrete evidence of the actual level of competition from independent facilities-based providers. Qwest presents no information that Cox is able actually to provide a significant level of enterprise service in the affected wire centers, and in particular to business customers. Moreover, Qwest does not even attempt to distinguish line losses attributable to carriers using Qwest facilities, including UNEs.

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<sup>9</sup> Qwest Opposition at 3.

<sup>10</sup> Qwest Opposition at 4 n.15.

Trade press articles about future opportunities for cable, including Cox's national growth rate, are not evidence of the actual level of facilities-based competition in Omaha. As noted, the GeoResults study obtained by McLeodUSA shows that cable still has connections to only a tiny fraction of buildings in Omaha. This by itself is more probative of the extent of facilities-based competition in Omaha than, and refutes, Qwest's broad stroke references to retail competition, which may or may not have anything to do with wholesale alternatives in the nine affected wire centers.

Qwest also incorrectly characterizes the previous record. It claims that it presented extensive evidence demonstrating that it is no longer the dominant provider in Omaha.<sup>11</sup> But it ignores that the Commission *declined* to find Qwest non-dominant in the enterprise market precisely because Qwest had provided essentially no information on the record about that market.<sup>12</sup>

Qwest entirely disregards the fact that in the *Omaha Forbearance Order*, the Commission predicted that:

Qwest will be subject to very strong market incentives to ensure that its network is used to optimal capacity – irrespective of any legal mandate that it do so. Faced with aggressive “off-net” competition from Cox, we *predict* that Qwest will endeavor to maximize use of its existing local exchange network, providing service at retail *and at wholesale*, in order to minimize revenue losses resulting from customer defections to Cox's service. In short, Qwest will prefer that a customer be served by a wireline competitor using Qwest's facilities at wholesale rates above that customer's use of Cox's network, which offers Qwest no revenue whatsoever but only a miniscule reduction in its costs.<sup>13</sup>

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<sup>11</sup> Qwest Opposition, Tietzel Declaration at 3.

<sup>12</sup> *Omaha Forbearance Order*, ¶ 50.

<sup>13</sup> *Omaha Forbearance Order*, ¶ 81 (emphasis added).

Unfortunately, as shown in this Reply and in McLeodUSA's Petition, Qwest's offerings are not reflective of an aggressive competitor that seeks to keep customers on its network but rather of a monopolist that controls access to the vast majority of customer locations in Omaha. Indeed, basic supply and demand principles instruct that a truly competitive market would prevent Qwest from increasing monthly recurring rates 72%-178% above the forward-looking cost-based prices.

The Commission has found that one of the ways "a carrier can profitably raise and sustain prices above competitive levels and thereby exercise market power" is "by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities, that its rivals need to offer their services."<sup>14</sup> The Commission has also recognized that "if a market is (or is presumed to be) competitive *ex ante*, the level of competition can be assessed by determining whether there have been *substantial* and *sustained* price increases."<sup>15</sup> A substantial price increase need not be a large increase but can be a "a small but significant non-transitory' price increase in the relevant product market."<sup>16</sup> The fact

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<sup>14</sup> See *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, ¶ 83 (1997) ("*Second Report and Order*"). The Commission recently followed this precedent and relieved the BOCs of their long distance separate affiliate requirements. See *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, 2000 Biennial Regulatory Review of Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules, CC Docket No. 00-175, *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, WC Docket No. 06-120, Report and Order and Memorandum Opinion and Order, FCC 07-159, ¶¶ 10, 19-20 (rel. Aug. 31, 2007).

<sup>15</sup> *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, ¶ 73 (2005) ("*Special Access NPRM*").

<sup>16</sup> *Special Access NPRM*, n.188.

that Qwest proposes very large increases for DS0, DS1, and DS3 network elements invalidates Qwest's already weak evidence of competition in Omaha.

Of course, the GeoResults study makes it clear why the market incentive this Commission predicted would constrain Qwest does not exist. There is no facilities competition except in a tiny fraction of the business premises in the Omaha market. Predicting that competition will survive on nothing more than optimism that a cable company will someday connect to numerous business premises leads directly to the re-monopolization of the local exchange market by the ILEC. Therefore, the Commission erred in assuming that Qwest would make reasonable wholesale offerings to forestall migration of wholesale customers to Cox's network.

The Commission is obligated to correct erroneous predictive judgments.<sup>17</sup> The Commission should take this opportunity based on the GeoResults study and Qwest's failure to make reasonable wholesale offerings to rescind its previous predictive judgment and reinstate UNE obligations in the nine affected wire centers.

### III. TELRIC IS A MEASURE OF REASONABLENESS

Qwest claims that a comparison to UNE rates is not relevant for purposes of evaluating whether the wholesale prices it has proposed to McLeodUSA are just and reasonable.<sup>18</sup> It claims that TELRIC is a narrow pricing methodology that has no bearing on the "just and reasonable"

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<sup>17</sup> Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 445 (D.C. Cir. 1991) ("should the Commission's predictions . . . prove erroneous, the Commission will need to reconsider its [decision] in accordance with its continuing obligation to practice reasoned decision making"); Cellnet Communications, Inc. v. FCC, 149 F.3d 429, 442 (6th Cir. 1998) (stating that, if the predictions do not materialize, the Commission "will of course need to reconsider its [decision] in accordance with its continuing obligation to practice reasoned decision-making").

<sup>18</sup> Qwest Opposition at 18.

standard of Section 271 or any utility outside of pricing for UNEs under Section 252(d)(1) and 251(c)(3).<sup>19</sup>

These arguments ignore the larger point that TELRIC is merely one flavor of forward-looking cost pricing, which the Commission has found should be the touchstone of reasonableness of prices in numerous areas beyond UNEs, such as interconnection<sup>20</sup> and access charges.<sup>21</sup> The Commission's goal for interstate access services, including special access, is to move prices towards forward-looking costs ideally through competition, but if not, by regulation.<sup>22</sup> And, the Commission has determined that TELRIC adequately defines a reasonable forward-looking price.<sup>23</sup>

In the *Local Competition Order*, the Commission adopted the TELRIC pricing methodology because it best replicates the rates available in "a competitive market."<sup>24</sup> The United States Supreme Court in *Verizon* explained that "Congress directed the FCC to prescribe methods for

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<sup>19</sup> *Id.*

<sup>20</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No 96-98, First Report and Order 11 FCC Rcd 15499, ¶ 618 (1996) ("*Local Competition Order*") (subsequent history omitted).

<sup>21</sup> *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 12 FCC Rcd 15982, ¶¶ 42, 48, 289 (1997) ("*Access Charge Reform*") (subsequent history omitted).

<sup>22</sup> *See id.*, ¶ 48.

<sup>23</sup> *See Local Competition Order*, ¶ 672.

<sup>24</sup> *Id.*, ¶ 679 ("Adopting a pricing methodology based on forward-looking economic costs best replicates, to the extent possible, the conditions of a competitive market."); *see also Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Services by Incumbent Local Exchange Carriers*, WC Docket No. 03-173, Notice of Proposed Rulemaking, 18 FCC Rcd 18,945, ¶ 16 (2003) ("the 'cost' of the element for purposes of section 252(d)(1) equals the price that an incumbent LEC would be able to charge for an element in a competitive market"); *see also Access Charge Reform*, ¶ 42 ("We conclude, consequently, that competition or, in the event that competition fails to develop, rates that approximate the prices that a competitive market would produce, best serve the public interest").

state commissions to use in setting rates that would subject both incumbents and entrants to the risks and incentives that a *competitive market* would produce.”<sup>25</sup> Because the *Omaha Forbearance Order* predicted that “Qwest’s market incentives will prompt it to make its network available – at competitive rates and terms – for use in conjunction with competitors’ own services and facilities,”<sup>26</sup> a comparison of Qwest’s proposed prices to UNE rates shows whether the proposed prices are set at competitive levels.

Qwest’s claim that TELRIC discourages investment is without any support.<sup>27</sup> The Commission has made no finding to that effect, and in fact, has concluded that forward-looking cost prices sends appropriate investment signals.<sup>28</sup> The Supreme Court found that CLECs had invested \$55 billion from 1996-2000 and that “a regulatory scheme that can boast such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment.”<sup>29</sup> Contrary to Qwest’s claims, the *USTA II* Court’s findings only applied to the Commission’s decision that declined to require ILECs to provide unbundled

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<sup>25</sup> *Verizon v. FCC*, 535 U.S. 467, 476 (May 13, 2002) (citing § 252(d)) (emphasis added).

<sup>26</sup> *Omaha Forbearance Order*, ¶ 83.

<sup>27</sup> Qwest Opposition at 19.

<sup>28</sup> *Local Competition Order*, ¶ 672 (“We believe the prices that potential entrants pay for these elements should reflect forward-looking costs in order to encourage efficient levels of investment and entry”).

<sup>29</sup> *Verizon*, 535 U.S. at 517. Qwest also submits that in the FCC’s Notice seeking comment on proposed modifications to the TELRIC methodology, the FCC raised concern that it can thwart one of the central purposes of the Act: the promotion of facilities-based competition. Qwest Opposition at 19. In the *TRRO*, the Commission addressed these concerns when it established specific wire center thresholds upon which ILECs would not be required to offer certain UNEs in a wire center. *TRRO*, ¶¶ 66, 146. It determined that by examining the number of carriers that deployed fiber-based facilities in a wire center, and the number of business lines served by a wire center, it was possible to determine whether CLECs had facilities-based alternatives to the ILECs’ facilities, or whether the revenue opportunities available with high volumes of business customers provided adequate incentive for CLECs to invest in their own facilities. *Id.*, ¶¶ 96, 103, 174-176, 178-180.



access to next generation networks used to provision “broadband capabilities of mass market loops.”<sup>30</sup> The Court never stated that TELRIC pricing was inappropriate when it came to the ILECs’ existing and likely fully depreciated network infrastructure.

Thus, even if we assume that TELRIC is not perfect and that some minor adjustments to it are warranted, or that prices should not be set exactly at TELRIC or some other forward-looking approach, TELRIC is a very reasonable approximation of where Qwest’s prices should be to be found just and reasonable.

Qwest’s proposed prices for DS0, DS1, and DS3 UNEs<sup>31</sup> in the nine affected wire centers actually exceed forward-looking cost as measured by TELRIC by huge margins and are by no means reflective of what “a competitive market would produce.”<sup>32</sup> Qwest’s commercial offering for basic 2- and 4-wire DS0 loops are 30% higher than the rates established by the Colorado Public Utilities Commission (“Colorado PUC”) as TELRIC compliant and that this Commission found reasonable in its decision approving Qwest’s Section 271 application for Nebraska, as well as being 30% higher than the rates Qwest charges for loops in its QPP agreement.

As shown below, Qwest’s special access rates for DS1 services are 72% to 120% higher than DS1 UNE rates depending on the term and plan purchased; its special access rates for DS3 services are 178% to 117% higher. This comparison understates the extent to which McLeodUSA would be financially impacted because the nine wire centers for which Qwest

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<sup>30</sup> *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 578 (D.C. Cir. 2004) (“*USTA II*”).

<sup>31</sup> Qwest Opposition at 15-16.

<sup>32</sup> *Verizon*, 535 U.S. at 476.

obtained forbearance are Zone 1 for UNE loops, but are predominantly Zone 2 for special access circuits and therefore the special access rates are higher.<sup>33</sup>

	TELRIC	Special Access, Phase II Pricing Flexibility Zone 1 <sup>34</sup>					
		Monthly		3 Year Term		RCP	
Services	Rates	Rates	% above TELRIC Rates	Rates	% above TELRIC Rates	Rates	% above TELRIC Rates
DS1	\$74.88	\$165	120%	\$130	74%	\$128.70	72%
DS3	\$791.17	\$2,200	178%	\$1,700	115%	\$1,716	117%

Qwest's proposed prices are presumptively unreasonable because they depart so significantly from the forward-looking cost-based prices that a competitive market would produce. Qwest's failure to claim its prices comply with any forward-looking cost approach, is little more than a direct assertion that it should be permitted to charge prices that by definition are unreasonable. Very significantly, although it complains about TELRIC, Qwest provides no alternative basis by which to judge its proposed prices. In fact, its proposed prices reflect little more than its historic inflated prices that it is able to impose because it controls access to the vast majority of buildings in Omaha and elsewhere.

Accordingly, the Commission should reject Qwest's argument that TELRIC is irrelevant to assessing the reasonableness of Qwest's proposed prices.

#### **IV. QWEST HAS NOT MADE REASONABLE WHOLESALE OFFERING IN THE NINE AFFECTED WIRE CENTERS**

##### ***A. General Interconnection Agreements Are Irrelevant***

Qwest claims that it has met the *Omaha Forbearance Order's* predictive judgment<sup>35</sup> because 47 of 58 CLECs that have ICAs with Qwest have executed amendments ("OFO Amend-

<sup>33</sup> McLeodUSA Petition, Eben Declaration, ¶ 7 and Exhibit 1 at 3.

<sup>34</sup> Qwest provided these rates in its Opposition. See Qwest Opposition at 15-16.

<sup>35</sup> Qwest Opposition at 8.

ments”) to bring their ICAs into compliance with the *Omaha Forbearance Order*.<sup>36</sup> These OFO Amendments, consistent with the *Omaha Forbearance Order*, prevent CLECs from obtaining DS0, DS1, and DS3 UNEs in the nine impacted wire centers in Omaha. These ICAs do not constitute alternative wholesale offerings because they simply require that the CLEC convert the UNEs it obtains in these nine wire centers to “alternative arrangements” or else Qwest will charge its Commercial DS0 Loop Facility Agreement or the applicable monthly rates for DS1 or DS3 special access facilities.<sup>37</sup> Even if these amendments were considered an alternative wholesale offering, Qwest has not shown that the CLECs that have signed them use or care about UNEs in the nine affected Omaha wire centers. Qwest has not even attempted to show how many of these CLECs, if any, even provide competitive local service in the Omaha market using these agreements as replacements for UNEs. Indeed, it appears that almost none of these amended ICAs are used by CLECs in the Omaha market. For example, between March 2006 and June 2007, McLeodUSA has ported telephone numbers from its local switch to only three (3) different service providers in Omaha – **[Begin - [End Confidential]**. This is a very strong indication that only one facilities-based provider – **[Begin Confidential] - [End Confidential]** – is potentially using the OFO Amendment as a replacement offering for UNEs, and **[Begin Confidential] - [End Confidential]** had, by far, the smallest amount of telephone numbers ported to it by McLeodUSA.

Therefore, the fact that a large number of CLECs have executed OFO Amendments does not demonstrate that Qwest is making reasonable wholesale UNE replacement offerings.

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<sup>36</sup> *Id.*

<sup>37</sup> McLeod Petition, Eben Declaration, Exhibit 3, at 4-5 of 70 (Sections 1.3-1.4).

**B. Qwest's DS0 Offer is Unreasonable**

Qwest claims that its proposed DS0 prices are reasonable because one unaffiliated competitor - AT&T/TCG - has executed a commercial DS0 Loop Facility Agreement to purchase DS0s in the OFO wire centers. Qwest relies on the Commission statement in the *TRO* that a "BOC might demonstrate that the rate at which it offers a Section 271 network element is reasonable by showing that it has entered into arms-length agreements" for the network element at that rate with "purchasing carriers."<sup>38</sup> (emphasis added). However, as reflected in the above quotation, the Commission wisely envisioned that it would take more than one arms length agreement to constitute evidence of reasonable 271 pricing. Qwest's claim of one such commercial agreement is insufficient on its face to show that it is making reasonable wholesale DS0 offerings in the absence of regulation.

The one agreement Qwest has entered into is with an affiliate of another BOC. The fact that a BOC would enter into such an agreement out-of-region does not provide evidence that the offering is reasonable because BOCs have resources to sustain unreasonable prices for a considerable period of time. Nor does it show that in an effort to establish reasonable prices and terms, this sole BOC agreement resulted from significant give-and-take negotiations reflective of a competitive market. BOCs are unlikely to contend that each other's pricing and terms are

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<sup>38</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 664 (2003) ("*TRO*"), corrected by Errata, 18 FCC Rcd 19020 (2003), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied sub nom. Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004).

unreasonable because success in that claim would undercut the rates, terms and conditions they each offer in-region. Therefore, this one agreement shows nothing.

Qwest also claims that the 2- and 4-wire DS0 loop rates of \$15.71 and \$30.84 included in the DS0 Loop Facility Agreement are reasonable because they approximate the TELRIC rates that the Nebraska Public Service Commission (“Nebraska PSC”) had at one point established.<sup>39</sup> Qwest implicitly concedes by this argument that TELRIC is a relevant benchmark for assessing the reasonableness of its DS0 prices. In addition, the prices ordered by the Nebraska PSC are not TELRIC compliant prices because the Nebraska PSC ignored this Commission’s prescribed TELRIC pricing model. The Nebraska PSC set loop rates by averaging the results of three different cost models<sup>40</sup> because of reluctance to make specific findings related to individual inputs, and its estimate that any possible bias contained in each model and its associated inputs would be minimized by averaging the results of the three models.<sup>41</sup> Its averaging approach; however, violated TELRIC pricing principles because if any of the models used to calculate UNE rates was flawed, averaging those results with TELRIC-compliant models would only result in excessive, non-TELRIC compliant rates, as reviewing courts have found.<sup>42</sup>

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<sup>39</sup> Qwest Opposition at 9.

<sup>40</sup> *The Commission, on its Own Motion, to Investigate Cost Studies to Establish Qwest Corporation’s Rates for Interconnection, Unbundled Network Elements, Transport and Termination, and Resale*, Application No. C-2516/PI-49, Order, at 21-22 (Nebraska PSC Apr. 23, 2002).

<sup>41</sup> *Id.* at 22.

<sup>42</sup> In 2000, the New Jersey Board took a similar split-the-baby approach between two cost models and its decision on appeal was found unlawful and overturned *AT&T v. Bell Atlantic-New Jersey*, 2000 WL 33951473, \*15-16 (D. N.J. June 06, 2000) (rejecting the New Jersey Board’s assignment of percentage ratios to the TELRIC cost models before it was “nothing more than a rough estimate of which model was ‘more wrong’ than the other” and resulted in unlawful “agency compromise rather than agency decision making.”).

Qwest recognized the infirmity of the Nebraska PSC's decision. In order to allay concerns about it and avoid Section 271 approval delays, it voluntarily reduced its 2- and 4-wire DS0 rates below the Nebraska PSC rates to \$12.14 and \$23.83, respectively, which were the TELRIC compliant rates set by the Colorado PUC.<sup>43</sup> Because of this reduction to Colorado rate levels, this Commission concluded that there was no need to evaluate whether the Nebraska PSC erred in establishing its rates based on averaging of cost models.<sup>44</sup> Therefore, the Nebraska PSC prices have no bearing on the reasonableness of Qwest's proposed DS0 prices. Rather, an appropriate comparison is not to the Nebraska PSC prices that have no operative effect and are not-TELRIC compliant, but to the Colorado UNE prices that Qwest used as a TELRIC compliant benchmark to set prices in Nebraska.

Qwest also suggests that its proposed DS0 price increases are reasonable because McLeodUSA allegedly at one point came close to agreeing to the OFO Amendment and therefore to the Commercial DS0 Loop Facility Agreement.<sup>45</sup> Even if true, this would be irrelevant because McLeodUSA did not agree ultimately to Qwest's demands for all the reasons stated in the Petition. McLeodUSA never came close to agreeing to the OFO Amendment because McLeodUSA wanted and had requested in its June 13, 2007 letter 271 pricing for UNE replace-

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<sup>43</sup> See Brief of Qwest Communications International Inc. In Support of Consolidated Application For Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska, and North Dakota, WC Docket No. 02-148 (filed June 13, 2002) at 12 & 163; *see also The Commission, on its Own Motion, to Investigate Cost Studies to Establish Qwest Corporation's Rates for Interconnection, Unbundled Network Elements, Transport and Termination, and Resale*, Application No. C-2516/PI-49, Order, at 1 (Nebraska PSC June 5, 2002).

<sup>44</sup> *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, Memorandum Opinion and Order, 17 FCC Rcd 26303, ¶ 247 (2002) ("*Nebraska et al. 271 Order*").

<sup>45</sup> Qwest Opposition at 11-12.

ments. McLeodUSA planned to ultimately shift from OFO Amendment prices to 271 reasonable pricing. Qwest has only offered its Commercial DS0 Loop Facility Agreement that increases DS0 rates by 30% and that would require McLeodUSA to falsely stipulate the rates are “just and reasonable.”<sup>46</sup>

Qwest’s refusal to include performance metrics and remedies as part of its Commercial DS0 offering also makes that offering unreasonable. In its opposition, Qwest provides only the feeble justification that performance metrics and remedies “need not be part of a Section 271 offering.”<sup>47</sup> Contrary to Qwest’s claims, when the Commission granted Qwest’s 271 authority in Nebraska, it specifically held that the “performance assurance plans (PAP) that will be in place in the nine states provide assurance that the local market will remain open after Qwest receives section 271 authorization.”<sup>48</sup> The Commission stressed that “[w]e find that these plans fall within a zone of reasonableness and are likely to provide incentives that are sufficient to foster post-entry checklist compliance.” It further noted that “[a]lthough it is not a requirement for section 271 authority that a BOC be subject to such performance assurance mechanisms, ... the existence of a satisfactory performance monitoring and enforcement mechanism would be probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such authority.” One of Qwest’s basic checklist obligations is to provide access to unbundled loops pursuant to Section 271 that may not be available pursuant to 251(c)(3).<sup>49</sup> Now that Qwest no longer has an obligation to provision § 251(c)(3) UNE loops in the nine affected wire centers in

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<sup>46</sup> McLeodUSA Petition, Eben Declaration, ¶ 25.

<sup>47</sup> Qwest Opposition at 22.

<sup>48</sup> *Nebraska et al. 271 Order*, ¶ 440.

<sup>49</sup> 47. U.S.C. § 271(c)(2)(B)(iv) (BOCs must provide “Local loop transmission from the central office to the customer’s premises, unbundled from local switching or other services”).

Omaha, its unreasonable refusal to offer its PAP with its 271 offering not only defies the Commission's *Nebraska et al. 271 Order* but also is probative evidence that Qwest has no intention to meet its 271 obligations going forward.

Furthermore, Qwest's position ignores the reality that Qwest has the incentive and ability to discriminate against competitors that are dependent on access to Qwest facilities to compete in downstream retail markets. For this reason, this Commission has imposed performance metrics on provision of checklist items that includes both Section 251 UNEs and "commercial" Section 271 offerings.<sup>50</sup> Indeed, nothing in the Commission's *Nebraska 271 et al. Order* limited the PAP to Qwest's 251(c)(3) offerings. Rather it was imposed to "foster post-entry checklist compliance."<sup>51</sup> In any event, this should not be an issue because if the Omaha marketplace were truly competitive as Qwest asserts, then Qwest would not be refusing to include its PAP or Service Level Agreements<sup>52</sup> with its DS0 commercial offering.<sup>53</sup>

Qwest's DS0 offering is additionally unreasonable because Qwest insists on limiting CLECs to using DS0s to serve their own end user customers. This is intended to prevent

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<sup>50</sup> *Nebraska et al. 271 Order*, ¶ 440.

<sup>51</sup> *Id.*

<sup>52</sup> Service Level Agreements ("SLAs") are standard features of commercial agreements entered into in a competitive marketplace. An SLA is an agreement between a user and a service provider defining the nature of the service provided and establishing a set of metrics to be used to measure the level of service provided measured against the agreed level of service. Such service levels might include provisioning, average availability, restoration times for outages, average and maximum periods of outage, average and maximum response times, latency, and delivery speeds. The SLA also typically establishes trouble reporting procedures, escalation procedures, and penalties for not meeting the level of service demanded – typically refunds to the users.

<sup>53</sup> While Qwest argues that its proposed commercial agreement provides a dispute resolution process, this process is an insufficient to ensure that Qwest complies with its obligation to offer the services on a timely and nondiscriminatory basis for the same reasons that such provisions would not be adequate to assure nondiscriminatory provisioning of Section 251 UNEs.



McLeodUSA from offering a competitive choice of local wholesale to other CLECs who desire a UNE-P-type solution to serve residential and very small business customers in lieu of purchasing Qwest's QPP UNE-P replacement service. This proposed restriction is anticompetitive and flatly violates the Section 251(b)(1) prohibition against unreasonable restrictions on resale.

Other than its underwhelming one commercial agreement with a fellow BOC, references to ICA agreements by CLECs that do not use DS0s, its comparison to defunct UNE prices, and the false claim that McLeodUSA had agreed to them, Qwest has provided no other evidence of reasonableness of its proposed DS0 prices. Therefore, there is no basis on the current record by which the Commission may conclude that these proposed price increases for DS0 loops are reasonable. As noted, the proposed 30% price increase is presumptively unreasonable because it exceeds forward-looking costs. Moreover, the terms associated with Qwest's DS0 proposal that are discussed above are unreasonable as well.

***C. Qwest's DS1 and DS3 Offer is Unreasonable***

Qwest claims that its existing special access offerings are sufficient to show that it has made reasonable commercial wholesale offerings of DS1 and DS3s in Omaha as the Commission predicted. It contends that the Commission in the *TRO* essentially decided that under Section 271, the alternative to DS1 and DS3 UNEs could be tariffed special access services.<sup>54</sup>

As discussed below, Qwest's general tariff offerings are unreasonable for a number of reasons irrespective of the particular circumstances of its offer to McLeodUSA. But the offer made to McLeodUSA is unreasonable for a number of additional reasons as well.

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<sup>54</sup> Qwest Opposition at 13.

McLeodUSA is seeking UNE replacements in nine wire centers in Omaha. It is not seeking to replace all its UNEs everywhere. As Qwest notes in its Opposition, McLeodUSA has been converting the small amount of special access it had elsewhere obtained to UNEs.<sup>55</sup> However, as it admits, Qwest flatly refuses to negotiate an Omaha specific agreement.<sup>56</sup> Instead, it insists on imposing an off-the-shelf Regional Commitment Plan (“RCP”).

Special access service designed for, and loaded with provisions geared to, customers that may purchase special access on a region-wide basis is not a reasonable replacement of UNEs in parts of Omaha even if otherwise reasonable, which it is not, for region-wide purchasers. In particular, the discounted pricing that Qwest has proposed is premised on region-wide commitments, not on purchase in a limited number of wire centers. Proposed restrictions and commitments that would compel McLeodUSA to limit purchase of UNEs and increase special access purchases over time are essentially unrelated to replacement of UNEs in nine wire centers in Omaha. In the *Omaha Forbearance Order*, the Commission envisioned that Qwest would make wholesale offerings to replace UNEs in the affected wire centers. The Commission did not say that it was reasonable for Qwest to refuse to tailor offerings to the circumstances in Omaha and instead offer only its existing region-wide special access plans.

In the Commission’s pending *Special Access NPRM* proceeding, Qwest suggests that the reasonableness of its special access prices, and whether it has raised prices, should be judged not by its month-to-month prices, which few if any customers pay, but by the actual prices that are paid by its special access customers, namely its RCP prices.<sup>57</sup> Now, Qwest asserts that

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<sup>55</sup> *Id.* at 15.

<sup>56</sup> *Id.*

<sup>57</sup> Comments of Qwest Communications International, Inc., WC. Doc. No. 05-25 RM-10593 (filed Aug. 8, 2007) at 48-49.

McLeodUSA may pursue discounts on special access by buying out of a tariffed term discount plan (e.g., 36-month term), pursuant to a tariffed RCP, and where Qwest has pricing flexibility, though contract tariffs.<sup>58</sup> But McLeodUSA could never qualify for those prices just by purchasing special access in the nine affected wire centers.

It is unreasonably discriminatory under Sections 201(b), 202(a), and 271 for Qwest to offer generalized special access with region-wide pricing conditions in the context of replacement of UNEs in a few wire centers. A reasonable offering would include reasonable pricing tailored to the limited extent to which McLeodUSA would need to use special access and not pricing tailored to region-wide conditions that McLeodUSA could never meet.

But Qwest's general special access offerings are not reasonable either. As noted, Qwest's proposed special access month-to-month and even discounted prices grossly exceed forward-looking pricing as measured by TELRIC, which is reflective of a competitive marketplace. Qwest's proposed rates are higher than what Qwest would otherwise be permitted to charge if price cap rates applied. For instance, Qwest's monthly DS1 special access price cap zone 1 rate is \$112.30;<sup>59</sup> however, Qwest's proposed Phase II pricing flexibility rates for monthly, 3-year term, and RCP rates are \$165, \$130, and \$128.70, respectively.

Qwest's assertion that its DS1 and DS3 special access prices may be lower than its sister BOCs is unpersuasive<sup>60</sup> because those other BOC rates are themselves grossly unreasonable as has been explained in the Commission's *Special Access NPRM*.<sup>61</sup> It has been shown in that

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<sup>58</sup> Qwest Opposition at 14.

<sup>59</sup> See Qwest-FCC No. 1 Section 7.11.4, at 7-347.

<sup>60</sup> Qwest Opposition, Teitzel Declaration at 15.

<sup>61</sup> See, generally, Reply Comments of ATX *et al.*, WC Doc. No. 05-25, RM-10593 (filed Aug. 15, 2007); Comments of ATX *et al.*, WC Doc. No. 05-25, RM-10593 (filed Aug. 8, 2007);

proceeding, among other things, the BOCs ARMIS rates-of-return are reflective of the supra-competitive rates charged.<sup>62</sup> Notably, Qwest's 2006 ARMIS rate of return for special access services in Nebraska was 190%,<sup>63</sup> which far exceeds the BOCs' average and excessive rates-of-return for special access services.<sup>64</sup> In a competitive environment these returns would be unattainable. Qwest's proposed rates are patently unreasonable and reflective of monopolistic pricing in light of these exorbitant rates-of-return.

In addition, for all the reasons stated by McLeodUSA and others in the Commission's *Special Access NPRM* proceeding, numerous non-price terms and conditions, such as limits on purchase of UNEs or of services from other providers and growth commitments, are unreasonable because they are designed to foreclose competition.<sup>65</sup> As explained in that proceeding,

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Reply Comments of ATX *et al.*, WC Doc. No. 05-25, RM 10593 (filed July 29, 2005); Comments of ATX *et al.*, WC Doc. No. 05-25, RM 10593 (filed June 13, 2005).

<sup>62</sup> See, e.g., Reply Comments of ATX *et al.*, WC Doc. No. 05-25, RM-10593 (filed Aug. 15, 2007) at 14-20; Comments of ATX *et al.*, WC Doc. No. 05-25, RM-10593 (filed Aug. 8, 2007) at 11-16; Reply Comments of ATX *et al.*, WC Doc. No. 05-25, RM 10593 (filed July 29, 2005) at 10-14; Comments of ATX *et al.*, WC Doc. No. 05-25, RM 10593 (filed June 13, 2005) at 7-10.

<sup>63</sup> The annual rate of return was calculated using ARMIS data reported for interstate special access services. Specifically, we divided Qwest-Nebraska's net return (40,980) by its average net investment (21,557) to calculate the rates-of-return. See ARMIS 43-01, Table 1, Cost and Revenue, rows 1910, 1915, col. s.

<sup>64</sup> See, e.g., Comments of ATX *et al.*, WC Doc. No. 05-25, RM-10593 (filed Aug. 8, 2007) at 11-12 ("ATX Comments").

<sup>65</sup> See, e.g., Reply Comments of ATX *et al.*, WC Doc. No. 05-25, RM-10593 (filed Aug. 15, 2007) at 23; Comments of Time Warner Telecom and One Communications, WC Doc. No. 05-25, RM-10593 (filed Aug. 8, 2007) at 36-42; Comments of XO *et al.*, WC Doc. No. 05-25, RM-10593 (filed Aug. 8, 2007) at 26-35; Comments of ATX *et al.*, WC Doc. No. 05-25, RM-10593 (filed Aug. 8, 2007) at 50-51; Reply Comments of ATX *et al.*, WC Doc. No. 05-25, RM 10593 (filed July 29, 2005) at 69-71; Comments of ATX *et al.*, WC Doc. No. 05-25, RM 10593 (filed June 13, 2005) at 35-39.

discounts premised on region-wide commitments are unreasonable because region-wide purchases have no relationship to cost.<sup>66</sup>

Since McLeodUSA filed its petition, Qwest has done no more than essentially renew its insistence on special access pricing and RCP terms and conditions. Accordingly, Qwest has not made a reasonable wholesale offering of DS1 and DS3 loops.

## **V. MCLEODUSA HAS MADE REASONABLE OFFERS**

McLeodUSA has been negotiating with Qwest in good faith since the *Omaha Forbearance Order*. On July 24, 2007 it proposed to Qwest that replacement network elements in the nine affected wire centers be priced at 15% above comparable UNE rates. This proposed pricing is reasonable because the Commission in the *TRRO* imposed that price level for network elements that it had determined would no longer be available as UNEs.<sup>67</sup> Although the Commission established this price as a transition price, the Commission would not have imposed it if it were not a reasonable price level. Moreover, this price level is close to, if not set precisely at, forward-looking cost. Therefore, it is clearly more reasonable than the exorbitant price levels that Qwest proposes.

McLeodUSA's offer is also reasonable because the proposed prices are lower than Qwest's retail prices for its comparable speed Internet access services. Qwest offers 1.5 Mbps download service to residential customers for \$44.99<sup>68</sup> per month and to small business custom-

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<sup>66</sup> See, e.g., ATX Comments at iii, 7-9.

<sup>67</sup> *TRRO*, ¶¶ 145 & 198.

<sup>68</sup> See Qwest Corporation, RESIDENTIAL: Internet Service, Qwest Broadband Pricing, available at <http://www.qwest.com/residential/internet/pricing.html> (visited Sept. 12, 2007).

ers for \$62.50<sup>69</sup> per month. Moreover, Qwest offers 7 Mbps download service to residential customers for \$54.99<sup>70</sup> per month and to small business customers for \$81.25<sup>71</sup> per month. This contrasts with McLeodUSA's proposed DS1, which is provisioned at 1.5 Mbps, rates of \$86.11 (15% higher than the UNE rate of \$74.88). McLeodUSA's proposed rates are presumptively reasonable because they exceed Qwest's prices to its own retail customers for services at comparable or much higher speeds. Similarly, Qwest proposed prices are unreasonable because they vastly exceed its own retail prices for comparable or much higher speed services.

Qwest responds that UNE rates plus fifteen percent as a permanent rate for Section 271 elements does not "adequately protect[]" Qwest's interests.<sup>72</sup> This truncated response does nothing to explain why McLeodUSA's proposal is not reasonable or justify Qwest's exorbitant proposed prices. Qwest's response is symptomatic of its practice of refusing to negotiate where it possesses market power arising from its control of access to the vast majority of customer locations in Omaha.

Accordingly, the Commission should conclude that McLeodUSA has made reasonable proposals for wholesale pricing.

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<sup>69</sup> See Qwest Corporation, SMALL BUSINESS: Qwest High Speed Internet, Pricing, *available at* <http://www.qwest.com/smallbusiness/internet/pricing.html> (visited Sept. 12, 2007).

<sup>70</sup> See Qwest Corporation, RESIDENTIAL: Internet Service, Qwest Broadband Pricing, *available at* <http://www.qwest.com/residential/internet/pricing.html> (visited Sept. 12, 2007).

<sup>71</sup> See Qwest Corporation, SMALL BUSINESS: Qwest High Speed Internet, Pricing, *available at* <http://www.qwest.com/smallbusiness/internet/pricing.html> (visited Sept. 12, 2007).

<sup>72</sup> Qwest Opposition at 20. Qwest states that McLeodUSA's proposal is unclear; however, the email expressly states McLeodUSA's proposed rates represent a 15% increase over the UNE rates. That is the offer. Not 15 percent over Qwest's proposed commercial rates. While the attachment does include references to the Commercial rates, those rates were inadvertently included in the spreadsheet provided to Qwest.

**VI. MCLEODUSA WILL EXIT THE OMAHA MARKET ABSENT REASONABLE WHOLESALE OFFERINGS**

As already explained, Qwest controls access to the vast majority of customer locations in Omaha. As a practical matter, there are no other alternative providers of access to the vast majority of customer locations. McLeodUSA has already informed the Commission that it will exit Omaha if it is not able to obtain reasonable prices for access to customer locations controlled by Qwest.<sup>73</sup>

Contrary to Qwest's suggestions, McLeodUSA would not be exiting the market because of competition.<sup>74</sup> McLeodUSA had succeeded in Omaha, with a dynamic and growing customer base, at least until McLeodUSA was forced to pull back its sales efforts in that market after the *Omaha Forbearance Order*.

Nor would McLeodUSA be exiting Omaha because of flaws in its business plan or execution thereof. Although Qwest would like the Commission to conclude that reliance on UNEs is a doomed business model, this contention is nothing more than a part of BOCs' public relations campaign to eliminate UNEs. In fact, many "smart build" CLECs, like and including McLeodUSA, are succeeding from a financial and service provisioning perspective and can expect continued growth even though BOCs continue to control last mile facilities.<sup>75</sup>

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<sup>73</sup> McLeodUSA Petition, Shah Declaration, ¶ 10.

<sup>74</sup> Qwest Opposition at 12.

<sup>75</sup> "Enterprise Outlook Update: Pricing and Volume Continue to Improve, CLECs Mostly Positively Leveraged," CIBC WORLD MARKETS, July 30, 2007, *filed as an attachment to* Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Dee May, Vice President, Federal Regulatory, Verizon, WC Docket No. 06-125 (filed August 29, 2007).

In any event, Qwest is in no position to lecture others in light of its own near death experience,<sup>76</sup> poor market performance, and criminal conduct by senior management.<sup>77</sup>

## VII. THE PUBLIC INTEREST REQUIRES MODIFYING THE OMAHA FORBEARANCE ORDER

Rather than providing the Commission with a substantive rebuttal, Qwest simply submits a procedural argument in response to McLeodUSA's showing that the public interest considerations set forth in Section 10(c) of the 1996 Act demand that the Commission modify the *Omaha Forbearance Order*.<sup>78</sup> Qwest does not refute the fact that the Commission never discussed in the *Omaha Forbearance Order* how granting forbearance promoted or enhanced competition, as required by the 1996 Act.<sup>79</sup> Without providing any meaningful discussion on the merits, Qwest simply states that McLeodUSA's argument that the costs of unbundling are determined by reference to the incremental costs of the Operation Support Systems "likely would not have succeeded."<sup>80</sup>

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<sup>76</sup> *Qwest Isn't As Hale As It Looks, the Bell Is Back from the Brink, But Its Cash Flow Could Come Under Pressure*, BUSINESS WEEK, February 6, 2006, [http://www.businessweek.com/magazine/content/06\\_06/b3970100.htm](http://www.businessweek.com/magazine/content/06_06/b3970100.htm), (visited September 11, 2007).

<sup>77</sup> *Qwest's Nacchio Convicted of Insider Trading*, NEW YORK TIMES, April 18, 2007, <http://www.nytimes.com/2007/04/18/technology/20qwest-web.html?ex=1334548800&en=08bdc2f7394be827&ei=5088&partner=rssnyt&emc=rss> (visited September 11, 2007).

<sup>78</sup> Qwest Opposition at 25-26.

<sup>79</sup> Although McLeodUSA does not concede that its Petition for Modification has any procedural infirmities, the Commission has ample authority to treat petitions for modification or other informal pleadings as petitions for reconsideration. See 47 C.F.R. § 1.41; see also, e.g., *JPJ Elec. Communications, Inc., For Reconsideration of Dismissal of Informal Request to Modify Station KNNQ312, Licensed to the Town of Clay, New York*, Order on Reconsideration, 16 FCC Rcd 2902, 2904 (Div. 2001) (addressing petition for modification filed outside time for petition for reconsideration under Section 1.41).

<sup>80</sup> Qwest Opposition at 26.



As set forth by McLeodUSA in the Petition for Modification, it was not Congress' intent when drafting the 1996 Act to promote "regulatory parity" but rather to promote or enhance competition among providers of telecommunications services. In evaluating the public interest, the Commission must ask whether forbearance "will promote competitive market conditions."<sup>81</sup> Section 10(d) of the 1996 Act provides that no petition for forbearance may be granted as to the obligations in §§251(c) or 271 until the Commission "determines that those requirements have been fully implemented."<sup>82</sup> Granting Qwest forbearance in the nine wire centers has not promoted competitive market conditions. In fact, since Qwest was granted forbearance, and contrary to the Commission's prediction that the market would prevent Qwest from abusing its market power, McLeodUSA has not been able to secure just and reasonable wholesale rates from Qwest. Comments submitted by other carriers confirm that other potential market entrants declined to enter the Omaha market in light of the grant of forbearance.<sup>83</sup> Forbearance is harming competition in Omaha.<sup>84</sup> Thus, forbearance is forcing one existing facilities-based competitor to exit the

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<sup>81</sup> *Qwest v. FCC*, 482 F.3d 471, 473 (D.C. Cir. 2007) (citing 47 U.S.C. § 160(b)).

<sup>82</sup> *Id.* (citing 47 U.S.C. § 160(d)).

<sup>83</sup> See Comments of Alpheus, Cavalier, CIMCO, DSLnet, First, Globalcom, Integra, Lightyear, MegaPath, Mpower, RCN, TDS, and TelePacific, WC Docket No. 04-223 (filed Aug. 29, 2007) at 8; Comments of Integra, WC Docket No. 06-172 (filed Mar. 5, 2007) at 5; Comments of Eschelon, Time Warner, and Cbeyond, WC Docket No. 04-223 (filed Aug. 29, 2007) at 3 ("Eschelon choose not to purchase McLeod's assets [in Omaha] after McLeod specifically sought out Eschelon as a buyer.").

<sup>84</sup> See, generally, Comments of Alpheus, Cavalier, CIMCO, DSLnet, First, Globalcom, Integra, Lightyear, MegaPath, Mpower, RCN, TDS, and TelePacific, WC Docket No. 04-223 (filed Aug. 29, 2007); Comments of COMPTTEL, WC Docket No. 04-223 (filed Aug. 29, 2007); Comments of Covad, NuVOx and XO, WC Docket No. 04-223 (filed Aug. 29, 2007); Comments of EarthLink and New Edge Network, WC Docket No. 04-223 (filed Aug. 29, 2007); Comments of Eschelon, Time Warner, and Cbeyond, WC Docket No. 04-223 (filed Aug. 29, 2007); Comments of Telecom Investors (Columbia Capital and M/C Venture Partners), WC Docket No. 04-223 (filed Aug. 29, 2007); Comments of TEXATEL, WC Docket No. 04-223 (filed Aug. 29, 2007).

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market and prevented more competition from entering. The bottom line is that the grant of forbearance in Omaha has had the opposite effect of what Congress expressly stated was the intended purpose of forbearance – forbearance is inhibiting and preventing competitive choices for Omaha consumers.

By empowering Qwest to unilaterally price other facilities-based CLECs out of the Omaha market, the Commission has fostered the exact opposite result than that expressly intended by Congress when it enacted Section 10(d) of the Act. Therefore, it is contrary to the public interest to continue to allow the Section 251(c) forbearance ruling to stand. The Commission should revoke this aspect of the *Omaha Forbearance Order* in order to best serve the public interest.

#### **VIII. CONCLUSION**

The Commission should promptly grant the Petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Lipman" with a stylized flourish at the end.

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